

requirement is not fatal to the continuation in force of the warrant after its use.

In the instant case the failure to specify in the warrant the number of days in which the warrant was to remain in force did not render the warrant invalid immediately after the date of its issue. The warrant was valid when it was issued and remained valid for a reasonable number of days, notwithstanding that such number of days was not stated therein. In my view, in the circumstances of this case a period of five to seven days after its issue was undoubtedly reasonable. Accordingly, I hold that the warrant was in force at the date of its execution, namely, November 8, 1984.

At any rate, even if I am persuaded to hold that the warrant was invalid at the date of its execution, I would, nevertheless, not be disposed to make an order for the return of the goods seized to the applicant. The applicant has been charged in the Magistrate's Court for offences under section 3(1) of the Copyright (Gramophone Records and Government Broadcasting) Act (Cap. 188) and the hearing of such charges is pending. The goods seized are obviously material exhibits for the purpose of the hearing before the magistrate's court. In these circumstances, I would be disposed to make an order that the exhibits remain where they are.

I therefore dismiss this application.

Application dismissed.

Solicitors: *Wee Ramayah & Partners; Lee & Lee.*

A MALAYSIAN REPORTS

HONG LEONG FINANCE BHD. v. DATANG-JADI INDUSTRY SDN. BHD.

[S.C. (Lee Hun Hoe C.J. (Borneo), Wan Suleiman & Syed Agil Barakbah S.C.JJ.) September 19, 1985]

[Kuala Lumpur – Supreme Court Civil Appeal No. 127 of 1985]

Practice and Procedure – Distress for rent – Seizure of goods – Goods leased to tenant – Lease terminated but goods not repossessed – Delay – Reputed ownership – Distress Act 1951, ss. 10(1) & 12.

In this case the respondent, the landlord of a warehouse, obtained a Warrant of Distress against the tenant of the premises for arrears of rent. The goods found in the warehouse were seized. The appellants were the owners of some of the machines distrained which were leased to the tenant. The appellants had terminated the agreement and asked that the goods be delivered to them forthwith but they had taken no positive steps to repossess the goods. The appellants applied for the release of the goods. The application was dismissed in the High Court and the appellants appealed.

Held: although the appellants had withdrawn the consent to continued possession of the goods, the learned Judge had held that six months was too long a period for the appellants to take positive steps to assert ownership. The question of delay is a finding of fact by the learned judge and in the circumstances the appeal must be dismissed.

F Cases referred to:

- (1) *Times Furnishing Company Ltd. v. Hutchings & Anor.* [1938] 1 K.B. 775.
- (2) *In re Fox* [1948] Ch. 407, 413.
- (3) *Perdana Properties Berhad v. United Orient Leasing Company Sdn. Bhd.* [1982] 1 M.L.J. 1.
- (4) *Singma Sawmill Co. Sdn. Bhd. v. Asian Holdings* [1979] 1 M.L.J. 41.
- (5) *United Orient Leasing Co. Sdn. Bhd. v. Perdana Properties Sdn. Bhd.* [1980] 2 M.L.J. 130, 133.

G

SUPREME COURT.

H *Miss Jennifer Cheong for the appellant.*
Chong Foo Seong for the respondent.

Cur. Adv. Vult.

I Lee Hun Hoe C.J. (Borneo) (delivering the Judgment of the Court): We dismissed the appeal and stated we would give our reasons later. We do so now.

The plaintiff (now respondent) is the landlord of a warehouse No. 174, Harper Street, Klang which was rented to the defendant at a monthly

rental of \$8,000. On October 25, 1984, as the defendant was in arrear of rental for 7 months, the respondent obtained a Warrant of Distress distraining the defendant's goods lying in the warehouse. On December 20, 1984, acting on the Warrant of Distress the bailiff seized the said goods and fixed January 17, 1985 for the auction of the same. However, on the day of the auction the applicant, Hong Leong Finance Bhd. (now appellant) and other claimants managed to get the auction postponed to enable them to file the necessary applications for the release of the goods.

The appellant was the owner of some of the machines distrained which were leased to the defendant pursuant to four lease agreements. The defendant defaulted in payment of the instalments of the rental. By a letter dated June 8, 1984 the appellant terminated the agreements and asked the defendant "to deliver the goods back to us forthwith failing which we shall effect repossession." From the time of the receipt of the letter till December 20, 1984 no positive step was taken by either the defendant to deliver or the appellant to repossess the goods.

The respondent, relying on section 12 of the Distress Act, 1951 (the Act), resisted the application. The learned Judge dismissed the application in chambers. After hearing further arguments in open court she confirmed her decision. The whole dispute seems to rest on the interpretation of sections 10 and 12 of the Act. The material part reads:

"12. Section 10 shall not apply –

(a)...to goods in the possession, order, or disposition of such tenant by the consent and permission of the true owner under such circumstances that such tenant is the reputed owner thereof;"

The material part of section 10 provides:-

"10(1) Where any movable property of –

...

(c) any other person whatsoever not being a tenant of the premises or of any part thereof, and not having any beneficial interest in any tenancy of the premises or of any part thereof, has been seized under a warrant of distress issued to recover arrears of rent due to a superior landlord by his immediate tenant, such...other person aforesaid may apply to a Judge to discharge or suspend the warrant, or to release a distrained article..."

It was argued that the court should order the release of the goods if section 10 applies. On the other hand, it was said no such order of release should be made as section 10 was excluded by section 12.

A The contention of the appellant, both here and in the court below, is that the landlord must show three things:

(a) that the goods were in the possession of the tenant;

B (b) that the goods were there under such circumstances that the tenant was the reputed owner of the goods;

(c) that both the first and second limbs apply.

C She said if any of the three limbs was not proved then the goods must be released to the true owner.

D Further, the appellant says in interpreting section 12(a) of the Act, it is necessary to look at section 48 of the Bankruptcy Act, particularly section 48(b) (iii) which is similar in substance to section 12(a). For this reason the appellant cited *Times Furnishing Company Ltd. v. Hutchings & Anor.*⁽¹⁾ where Humphreys, J. said at page 784:-

E "...For that proposition he relied on a series of cases which, I think, without exception, were bankruptcy cases. It appears to be the fact that since the reign of James I all the Bankruptcy Acts have had in them a provision which is, so far as is material, identical in language with that used in s.4, sub-s. 1, of the Law of Distress Amendment Act, 1908..."

F *In re Fox*⁽²⁾ was also cited. There a builder was adjudicated bankrupt. Certain building materials were lying in the builder's yard and on the site. The trustee in bankruptcy claimed that all the materials had vested in him under section 38(c) of the Bankruptcy Act, 1914 (same as our section 48). The Court of Appeal disagreed with the County Court Judge that there was no distinction between (a) the materials in the yard or (b) those on the site and held that the bankrupt was in possession of the materials in the yard by permission of the first appellants in such circumstances that he was the reputed owner of them. In delivering the judgment of the court Jenkins J., as he then was, stated at page 413:

H "...To bring s.38(c) into operation it must be shown not merely that the goods in question were in the bankrupt's possession, but also that they were in his possession under such circumstances that he was the reputed owner thereof, and furthermore that they were so in his possession by the consent or permission of the true owner."

I In the present case, the appellant argued that since the learned Judge found that consent had been withdrawn by the true owner the question of reputed ownership could not arise. In *Perdana Properties Berhad v. United Orient Leasing Company Sdn. Bhd.*⁽³⁾ the Privy Council was concerned

with the effect of sections 10 and 12 of the Distress Ordinance, 1951. It was held that the consent was effectively withdrawn. At page 2 Lord Russell of Killowen, delivering the judgment of the Board, stated:-

"The short point is whether in the light of the letter dated September 3, 1979 it could thereafter be said that the equipment was in the possession of the emporium by the consent and permission of the respondent. Counsel for the appellant accepted that he must surmount that hurdle at the outset (and before any discussion of reputed ownership) if he was to dispute the availability of section 10."

At page 94 of the Appeal Record the learned Judge, after referring to *Perdana Properties'* case⁽³⁾ observed that:

"...the Privy Council held that all that was required for an effective withdrawal of consent to continued possession is for the claimant to sufficiently indicate such withdrawal by a communication from it to the defendant. In this case such communication was contained in the letter dated June 8, 1984, where the claimant had in no uncertain terms determined the lease agreement thereby drawing its consent to the defendant being in possession of its machinery and that such a meaning and understanding could not possibly have escaped the defendant who after all had been aware all along that it had breached a condition of the lease agreement in failing to meet payments."

Having made such a finding the appellant contended that the learned Judge should not have gone on to consider the question of reputed ownership.

On the other hand, the respondent submitted the learned Judge was right to consider the lapse of time between the sending of the letter and the date on which distress was levied. The letter was sent on June 8, 1984. The Warrant of Distress was executed on December 20, 1984 – a period of more than six months before the appellant took any active step to assert ownership of the goods.

The appellant contended that he was giving the defendant six months to deliver the goods before he considered repossession. He thought a period of six months was reasonable. But, before he could do anything the goods were seized. The learned Judge had this to say at page 95 of the Appeal Record:

"...One would expect that when the defendant failed to deliver the machinery forthwith as directed in the claimant's letter, the claimant should have come in to reassert its ownership and since no reasons were given why it failed to do so, I consider that 6 months is too long a delay for the defendant to consider sending the machinery back especially when it has not been prompt in its payments of rentals and various reminders for payment had been given prior to the letter dated June 8, 1984. To that end, delay

A must work against the claimant and to that extent, the doctrine of reputed ownership applies as to prevent the claimant from its right to the ownership of the machinery distrained..."

As to the three factors which the landlord had to prove in order to make section 12(a) to apply, the respondent pointed out that section 12 removes the right under section 10. He submitted that there was another factor which requires the true owner to show that he has taken some positive steps to have his goods repossessed, that is, to reassert his right of ownership within a reasonable time. This factor was not discussed in *Perdana Properties' case*⁽³⁾ as Lord Russell of Killowen made clear that "... it is not proposed to discuss other questions that otherwise might have arisen."

In *Singma Sawmill Co. Sdn. Bhd. v. Asian Holdings (Industrialised Buildings) Sdn. Bhd.*⁽⁴⁾ the true owner came in only after 8 months to reassert ownership of the goods after the goods had been distrained. Syed Othman J., as he then was, made these observations at page 42:

"... The circumstances require that the claimants, as owners, should have taken positive steps if not at the outset, at least after the expiry of the lease, to assert that the machinery belonged to them, as they knew or should have known that the defendants were running a factory in rented premises with apparently no real assets. In the circumstances, I find that the claimants have been largely responsible for representing that the defendants' assets lay with the machinery and for painting the defendants with the colour of ownership of the machinery."

In *United Orient Leasing Co. Sdn. Bhd. v. Perdana Properties Sdn.*⁽⁵⁾ Syed Othman, F.J., in delivering the judgment of the Court, stated at page 133:

G "It may be accepted that in the circumstances, the notice of assumption at the time it was given could have been for the purpose of forestalling seizure by the court. We are also of the view that under ordinary circumstances the fact that the appellants gave notice of assumption of property without taking any positive steps to recover possession did not erase reputed ownership by the emporium at the time. The law appears to be that even if there is a termination of agreement, goods remaining in the possession of the tenant may still be within the reputed ownership of the tenant and liable to distress..."

The respondent submitted that in none of the cases cited by the appellant except in *Singma's case*⁽⁴⁾ was the question of delay in issue. The question of delay is a finding of fact by the learned Judge. Clearly, she considered six months too long a period to take positive steps to assert ownership. The defendant was asked on June 8, 1984 to deliver the machinery "forthwith". As the learned Judge said at page 95 of the Appeal Record:

"I can understand it if the claimant did not do anything positive for a month at least to enable the defendant to delivery the machinery but to wait until the machinery were seized and then state that its right to repossess had just arisen then is stretching this right too far..."

We see no reason to interfere with the decision of the learned Judge. Accordingly, we dismissed the appeal with costs. Deposit to respondent on account of taxed costs.

Appeal dismissed.

Solicitors: *Mah-Kok & Din; Azam-Malek & Soh.*

MANANG LIM NATIVE SDN. BHD. v. MANANG SELAMAN

[S.C. (Lee Hun Hoe C.J. (Borneo), Wan Suleiman & Seah S.C. JJ.) May 8 & September 12, 1958]

[Kuching — Supreme Court Civil Appeal No. 210 of 1984]

Native Area Land — Agreement and Declaration of trust — Caveat — Application to remove — Qualified prohibition — Whether "native" includes company — Sarawak Interpretation Ordinance, s. 2 — Land Code (Sarawak Cap. 81), ss. 2, 8, 9 & 177 — Federal Constitution, art. 161.

Contract — Dealing in native land — Illegal contract — Contracts Act, 1950, s. 2(g).

In this case the respondent was registered as the proprietor of land classified as Native Area Land. He executed two documents (a) an agreement and (b) a declaration of trust. In the latter document he declared that he held the land in trust for the appellant. No authorization of the Yang di-Pertua Negeri had been obtained. A caveat was lodged by the appellant in respect of the said land and this was duly registered. The respondent applied for an order to remove the caveat. The High Court allowed the application and awarded costs to the respondent ([1986] 1 M.L.J. 312). The appellant appealed.

Held: (1) having regard to the definition of "native" in the Sarawak Interpretation Ordinance it would appear that the clear intention of Parliament is to confine the meaning of native to a natural person. The word "native" is therefore limited to only a natural person;

(2) the agreement made between the respondent and the appellant was an agreement made in contravention of section 8(b) of the Sarawak Land Code. As such it was entered into for an illegal consideration and was therefore a void agreement within the meaning of section 2(g) of the Contracts Act, 1950;

(3) since the appellant lodged the caveat to protect an agreement which is expressly prohibited by statute it follows that the appellant cannot lawfully assert any interest in the said land. The consideration being deemed to be illegal, an order must be made for the removal of the caveat.

A Cases referred to:

- (1) *Daimler Co. Ltd. v. Continental Tyre* [1916-1917] All E.R. Rep. 191.
- (2) *H.M. Prosecutor-General v. M.C. Spencer, Controller of Mitsui & Co. Ltd.* [1945] A.C. 124.
- (3) *Sussex Peerage Case* (1844) 8 E.R. 1034, 1057.

B SUPREME COURT.

Miss S.Y. Chan for the appellant.
James King for the respondent.

C *Cur. Adv. Vult.*

Seah S.C.J. (delivering the Judgment of the Court): The respondent, Manang Selaman anak Nyalau *alias* Lim Kim Tui is registered as the proprietor of that parcel of land situate at Bintawa, Kuching, Sarawak containing an area of 5.84 acres, more or less and comprised in Kuching Lease of State Land No. 5352 of 1952 (hereinafter referred to as the said land). On February 4, 1974 the respondent executed two documents, *viz.* (a) Agreement and (b) Declaration of Trust. In the latter document, the respondent declares that he is holding the said land together with another piece of land situate at Mugok Ayer Trejun, Kuching, Sarawak containing an area of 1.34 acres, more or less and described as Lot 4412 Muara Tebas Land District (for which we are not concerned) in trust for the appellant, Manang Lim Native Sdn. Bhd. A caveat was lodged by the appellant on December 12, 1974 in respect of the said land and this caveat was duly registered at the Kuching Land Registry office as Instrument No. L8916/1974 (hereinafter called the said caveat). On December 2, 1982 the respondent took out a Originating Motion in the High Court at Kuching pursuant to section 177(1) of the Sarawak Land Code (Cap. 81) for an order to remove the said caveat. An affidavit was filed in support of the motion. The appellant delivered an affidavit opposing the application. After hearing the submissions of learned counsel for the parties the learned judge ordered the said caveat be removed and awarded costs also to the respondent. The learned judge said:

"I hold that the two documents, namely, the agreement and the trust deed above referred to, are illegal as being made in contravention of the provisions of section 8 of the Land Code, in that they relate to a dealing which is prohibited by law, and are, therefore, void and unenforceable. Consequently, the respondent (the appellant in this appeal) can have no valid claim to an interest in the said land under or by virtue of the said two documents or either of them, such as would entitle it to maintain the caveat lodged by it against the said land."